

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	CASE NO. 5:18CR00487
)	
Plaintiff,)	JUDGE DAN AARON POLSTER
vs.)	
)	<u>OPINION AND ORDER</u>
DESMOND NEAL CLAY,)	
)	
Defendant.)	

Before the Court is Defendant Desmond Clay’s Motion for Compassionate Release, **Doc #:** **119**. Clay filed a supplement to the Motion (Doc. #: 121) and the United States filed a reply (Doc. #: 124). For the following reasons, Clay’s Motion is **DENIED**.

I. Background

Clay pleaded guilty to conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 841, 856 and was sentenced to 33-months in the custody of the Bureau of Prisons. Doc. #: 51, 92. He is currently held at Federal Correctional Institute Elkton (“FCI Elkton”) and has an expected release date of March 2, 2021.¹ Clay asks the Court for compassionate release under 18 U.S.C. § 3582(c)(1)(A) due to concerns regarding heightened risk posed to him by confinement during the COVID-19 pandemic.

II. Discussion

a. Exhaustion

A court may consider a motion for sentence modification upon:

[M]otion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the

¹ <https://www.bop.gov/inmateloc/>.

defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier

18 U.S.C. § 3582(c)(1)(A).

Clay made his request to the Warden of FCI Elkton on May 18, 2020 and the Warden denied his request on May 22, 2020. Doc #: 119, ex. 1. Because more than 30 days must have passed since the Warden received Clay's request, Clay has satisfied the exhaustion requirement.

See United States v. Alam, 960 F.3d 831, 836 (6th Cir. 2020).²

b. Sentence Modification

Under § 3582(c)(1)(A)(i), before granting a sentence modification a court must find: (1) extraordinary and compelling reasons warrant a sentence modification; (2) the defendant is not a danger to the safety of any other person or the community; and (3) the reduction is appropriate considering the § 3553(a) factors. *United States v. Hardin*, 2020 U.S. Dist. LEXIS 90855, at *5 (N.D. Ohio May 21, 2020).

Extraordinary and compelling reasons for sentence modification exist under four categories set forth at U.S.S.G. § 1B1.13 Application Note 1. Here, the only relevant category is the fourth category, labeled "other reasons." *Id.* at *8. To determine whether other reasons warrant sentence modification, the Court considers whether: (1) the defendant is at high risk of having grave complications should he contract COVID-19, and (2) the prison where the defendant resides has a severe COVID-19 outbreak. *Id.*

In his Motion, Clay asserts that as an African American man with hypertension he is at great risk of serious illness or death from COVID-19. Doc #: 119 at 13–14. The medical records Clay submitted with his motion contradict the claim of hypertension, and these alleged risk factors

² The government reserves its argument that the Sixth Circuit in *Alam* incorrectly interpreted the exhaustion requirement, but it concedes that under that precedent the Court can consider Clay's Motion.

are not addressed in the supplement to his motion. Doc. #: 119, ex. 2 at 10, 16, 20; Doc #: 121.³ In the supplement, Clay states he tested positive for COVID-19 in May and was placed in isolation at FCI Elkton. Doc. #: 121 at 2 (citing Doc. #: 119, ex. 2 at 3). He does not identify any symptoms or complications he experienced. Clay asserts that because it is unclear whether he is at risk for reinfection, the Court should grant compassionate release. Doc. #: 121 at 2.

The record shows Clay contracted COVID-19 and did not experience grave complications. Regardless of the uncertainty as to whether he is at risk of contracting COVID-19 again, the Court finds he has not shown extraordinary and compelling reasons warrant release because the facility where he resides is not experiencing a severe COVID-19 outbreak. While FCI Elkton previously had over 1000 cases among inmates and staff members, currently it only has five cases, including three inmates and two staff members.⁴

Because Clay does not show extraordinary and compelling reasons warranting a sentence modification, the Court does not decide whether he is a danger to the safety of any other person or the community or whether the § 3553(a) factors favor release.

III. Conclusion

For the foregoing reasons, Clay's Motion, **Doc #: 119**, is **DENIED**.

IT IS SO ORDERED.

/s/Dan Aaron Polster August 25, 2020
DAN AARON POLSTER
UNITED STATES DISTRICT COURT

³ As the government identifies, Clay's initial Motion appears to be a form motion that is not tailored or entirely accurate as to Clay's circumstances. Therefore, the Court will consider only the arguments made in the supplement.

⁴ *COVID-19 Coronavirus*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Aug. 25, 2020).